

FEBRUARY 11, 1768.

Unto the Right Honourable the Lords of Council and Session,

THE
PETITION

OF

DAVID HENDERSON of *Stempster*,

Humbly sheweth,

THAT the Petitioner, having the Superiority of his own Estate of *Stempster*, valued at 248 *l.* purchased from *George Sinclair* of *Ulbster*, Esq; the Superiority of the Lands of *Thura* and others, valued at 176 *l.* and having, in due Time, lodged his Claim, did, at the *Michaelmas* Head-court for the County of *Caithness*, held upon the 30th of *September* last, crave to be put on the Roll as a Freeholder and Voter of said County.

The Titles produced in behalf of your Petitioner, were,

1mo, A Charter, containing a Precept of *Seafine*, past and expedite in favours of *George Sinclair* of *Ulbster*, under the Great Seal, dated the 13th Day of *February* 1749 Years, of several Lands therein mentioned, and, particularly, all and haill the *Newlands* of *Ormley*, commonly called *Bloodymoss*, and haill Pertinents thereof, lying in the Parish of *Thurso*, and Sheriffdom of *Caithness*.

2do, Another Charter, containing a Precept of *Seafine*, past and expedite in favours of the said *George Sinclair*, under the Seal aforesaid, dated the 11th Day of *December* 1752 Years, of certain Lands

A

therein

therein mentioned ; and, particularly, all and haill the Lands of *Thura, Bowerlen, and Tofikemp and Kirkbouse*, and haill Pertinents thereof, lying within the Parish of *Bower* and Sheriffdom foresaid,

3^{to}, Contract of Wadset, dated the 26th Day of *January* 1753 Years, entered into between the said *George Sinclair* and your Petitioner, whereby, for certain Considerations therein recited, the said *George Sinclair* of *Ulbster* wadset and disposed in favour of your Petitioner, the Superiority of the Lands and others aforesaid, and assigned to him the foresaid Charters and Precepts of Seafine therein contained, in so far as concerns the Lands before mentioned ; and, in virtue of the said Precepts of Seafine and Assignment thereto, your Petitioner was duly infeft in the Lands and others foresaid, upon the 27th Day of *January* 1753, and his Seafine registrate in the particular Register of Seafines kept for the Shire of *Caitbness*, the 13th Day of the same Month.

4^{to}, The foresaid Charter, containing a Precept of Seafine, passed and exped in favours of the said *George Sinclair*, under the Seal aforesaid, dated the 11th Day of *December* 1752 Years, of certain Lands therein mentioned ; and particularly, all and haill the Town and Lands of *Stambuster*, commonly called *Stampster*, comprehending the Town and Lands of *Knockdee* and *Newtown*, and haill Pertinents thereof, lying within the Parish of *Bower* and Sheriffdom foresaid.

5^{to}, Disposition by the said *George Sinclair*, in favours of your Petitioner, dated the 26th Day of *January* 1753 ; and, in virtue of the said Precept of Seafine, assigned, as said is, your Petitioner was duly infeft upon the 27th Day of *January* 1753 Years, and the Instrument of Seafine registrate in the Particular Register of Seafines kept for the Shire of *Caitbness*, the 30th Day of the same Month ; and which Lands and others, are valued in the Valuation-book at, and pay Cess and other publick Burdens of the County, for more than 480 *l. Scots* Money, as appears from the Cess-books of the County. And, for instructing the said Claims, produced the Charters, Disposition, and Contract of Wadset, and Seafines before recited ; together with the foresaid Claim given in to the Sheriff Clerk-depute of the County, and by him duly indorsed on the Back, in Terms of the Act of Parliament, upon the 25th Day of *July* last : And for instructing the valued Rent of the said Lands, produced a Certificate, subscribed by two of the Commissioners of Supply,
upon

upon the 26th Day of *September* last, certifying, That the *Newlands of Ormley*, commonly called *Bloodymoss*, are valued in the Book of Valuation of the County of *Caithness* at 20*l. Scots*; the Lands of *Thura* and *Pendicles*, at 148*l. 6s. Scots*; the Lands of *Kirkhouse* at 8*l. Scots*; the Lands of *Stempster* and *Knockdee* at 248*l. Scots*, amounting in whole to 424*l. 6s. Scots*.

Sir *John Sinclair* of *Mey* was pleased to object to your Petitioner,

1mo, That Captain *John Sutherland*, of *Holmes's* Regiment, was infest in the *Newlands of Ormley* on the 17th of *September* 1751, upon the Precept of the same Charter, which certainly could not be assigned afterwards by *Ulbster*, so as to give any feudal Right to your Petitioner, and without it he has not 400*l.* of Valuation.

2dly, Admitting he had a proper Title to the *Newlands of Ormley*, he had none of the Superiority of *Thura*; these Lands held of the Bishop of *Orkney*, as appeared by an authentick Certificate of Sir *Donald Mackay's* *Seafine*, recorded at *Chanoury* the 4th Day of *December* 1624; and, when *Ulbster* raised a Process of Reduction and Improbation against the Vassals of the *Caithness* Family, in the Year 1726, *Sinclair* of *Thura* was assolitied, as holding his Lands of the Crown, in place of the Bishop.

To these two Objections, which were the only ones that were stated against him at the Meeting of Freeholders, the Petitioner gave such Answers, as he apprehended were sufficient, and, as he hopes, will appear so to your Lordships; but the Freeholders refused to admit him to the Roll.

The Petitioner therefore did, in terms of the Statute of the 16th of his late Majesty, present a Complaint to your Lordships, which being followed by Answers, Replies, and Duplies, your Lordships, on the 2d of *February* 1768, were pleased to pronounce the following Interlocutor: "The Lords having advised this Petition and Complaint, with the Answers, Replies, and Duplies, they dismiss the Complaint, and find the Complainer liable in the statutory Penalty of 30*l. Sterling*, and full Costs of Suit, and decern and ordain an Account to be given in."

The Petitioner would humbly submit this Interlocutor to the Review of your Lordships.

And, in the Entry, it is material to observe, that the Objections to the Petitioner's Qualification have been very much multiplied since it came before your Lordships; for he does, with Submission, apprehend,

apprehend, that the Objections offered at the Meeting of Freeholders have been sufficiently obviated; he shall, however, as shortly as possible, lay before your Lordships the whole of the Objections, with the Answers which occur to them.

The first Objection respects the Evidence of the Valuation of the Lands claimed on; for it is alledged that a Certificate, signed by two Commissioners of Supply, was not sufficient.

To which it is answered, that, however Disputes may arise concerning the Powers of Commissioners of Supply, to ascertain any Thing further than what is precisely to be found in the Valuation-book, it is apprehended, that there can be no Dispute as to their ascertaining what is in the Book; nor will your Lordships require, that it should be ascertained by the formal Subscription of the Collector of the Cess, or of the Supply-clerk. In the present Case, the Collector of the Cess is Lord *Duffus*, who never does any Business, and Mr. *Sutherland* of *Wester*, the Supply-clerk, was confined to his Bed with a Fever; but it is imagined the Attestation of two Commissioners of Supply must be held as Evidence enough of so simple a Fact.

It is more particularly objected, that this Certificate is not a true one, for *Ormley* and *Pendicles* are valued at 32 l. 1 s. 2 d. and, in another Article, *Newlands* of *Ormley* at 20 l. so that neither apply to *Ormley* or *Bloodymoss*, in the Petitioner's Seafine.

To this it is answered, that, in the Charter dated in the Year 1749, claimed on in favours of *Ulster*, there are, among other Lands, the Lands of *Ormley*, lying in the Parish of *Thurso*; and there are also the Lands of *Ormley*, or new Lands of the same, commonly called *Bloodymoss*, lying in the same Parish, which are immediately adjoining to the Lands of *Ormley*.

It is objected, that it is not certain, that the Lands of *Newlands* of *Ormley*, commonly called *Bloodymoss*, mentioned in *Ulster's* Charter, are the same with the *Newlands* of *Ormley*, stated in the Valuation 1701.

To this it is answered, that there is not, in the whole Valuation-book, any other Parcel of Land called the *Newlands* of *Ormley*, but one Parcel only; and, therefore, there can be no doubt as to the Identity, though the usual Appellation of *Bloodymoss* is adjected *per incrementum*.

It is objected, that Captain *Sutherland*, now deceased, was inest in these Lands of *Newlands* of *Ormley* in September 1751, upon

a Contract of Wadset from *Ulbster*, wherein the Precept of Seafine in the Charter now claimed on was assigned; so that the Precept being thus exhausted, could not be executed again without a new Charter.

The Petitioner might argue the Point of Law upon this Head, and he hopes successfully too; but there is no Occasion for it, because the Fact is, that Captain *Sutherland* was infest in all the Lands contained in the Contract of Wadset, *except the Newlands of Ormley, or Bloodymofs*: And had that not been the Case, the Petitioner has 400 *l.* of valued Rent, without these Lands, *viz.*

	£.	sh.	d.
<i>Stempster and Knockdee</i>	248	8	0
<i>Thura and Pendicles</i>	148	6	0
<i>Kirkhouse</i>	8	0	0
	£. 404	14	0

It is objected, that a Superiority is incapable of being made a proper Wadset.

The Petitioner shall not take up your Lordships Time with resumming any of the learned Arguments which have been lately stated to your Lordships upon that Point, as he rests assured that it is well established.

It is objected, that the Petitioner's Right is nominal and fictitious, as he paid no Price in consideration of it.

Your Lordships will observe, that the Objection applies only to the Superiority of *Thura, Bloodymofs, and Kirkhouse*, which makes the least Part of the Valuation, for the greatest Part is of the Petitioner's own Property; but the Petitioner positively denies this Allegation; and your Lordships must, no doubt, see, that the asking a Proof of it is, from the Circumstances of the Case, calculated merely to delay a Decision of the Cause; so he hopes your Lordships will not listen to it.

It is objected, that the Petitioner's Right to the Superiority of *Thura*, which he derives from *Ulbster*, is not a good one, and *George Taylor*, the present Possessor of *Thura*, is led forward to state himself as a Party in Opposition to this Right.

This Objection can be answered in the following satisfactory Manner:

B

On

April 6,
1687.

On the 6th April 1687, *Murdoch*, Bishop of *Orkney*, with Consent of the Dean and Chapter, gave a Charter of the Lands of *Thura*, &c. to *John* Earl of *Breadalbane*, to be held feu, proceeding on the Earl's own Resignation, confirming his former Rights to, and of-new disposing these Lands. On this Charter the Earl was infeft, and the Seafine is recorded at *Wick*, the 28th December 1687.

It was stated in the Replies for the Petitioner, that this Charter could not now be produced. Information, however, has since been received from *Caitbness*, that this Charter is found, but the Tenor of it appears from an Extract of the Seafine produced.

April 24,
1694.

Of this Date, the Earl of *Breadalbane* obtained a Charter, containing a *Novodamus*, under the Union Seal, of the whole Lands contained in the foresaid Charter from the Bishop, and of sundry other Lands, particularly of the Lands of *Thura*, on which he was infeft on the 1st, 2d and 3d Days of November 1694, and the Seafine recorded at *Edinburgh*, the 12th of December thereafter.

July 26,
1718.

Of this Date, the Lord *Glenorchy* obtained a Charter from the Crown, of these Lands, on the Resignation of his Father, on which he was infeft, and the Seafine registrate at *Edinburgh*, 29th July 1720; and these Lands of *Thura* are uniformly in the Charters and Infeftments of the Estate since.

In Opposition to this, there is produced for the Possessor a Charter from the Bishop, in the 1624, to Sir *Donald Mackay*, and Seafine on it; and there is further mentioned in the Duplies sundry Charters and Dispositions to Sir *Donald* and his Authors, of these Lands, neither of which are produced; but no Writing whatever is founded on to connect with Sir *Donald*; on the contrary, it is admitted in the Duplies, that the Possessor cannot connect with Sir *Donald Mackay*.

To supply this, mention is made, in the Duplies, of a Disposition from *Sinclair* of *Brims*, dated 20th July 1646, to *James Sinclair* in *Brims*, upon which *James Sinclair* is said to be infeft 18th January 1647; and it is alledged that Mr. *Taylor* of *Thura* holds the Lands by a connected Progress from the said *James Sinclair*.

But this Disposition and Infeftment is not produced; and, if produced, cannot aid the Objector, as he shows himself, that the Lands belonged at that Period to Sir *Donald Mackay*, and not to *Sinclair* of *Brims*; and the Petitioner has Reason to believe, that

Mr.

Mr. *Taylor* of *Thura* does not connect even with this Disposition from *Sinclair* of *Brims* (if there is any such); for your Lordships will be informed, that Mr. *Sinclair* of *Ulbster*, the Petitioner's Author, raised a Process of Improbation, Mails and Duties, against the Possessor of the Lands of *Thura*, among others, in the 1724; in which Mr. *Taylor*'s Author produced the foresaid Charter by the Bishop to Sir *Donald Mackay*, and Seafine on it, and the oldest Writing: but these produced for him, was a Disposition from *Sinclair* of *Tofthemp* to *William Sinclair*, his Son, dated 3d March 1651, but upon which no Infeftment followed; and the first Infeftment produced in favours of Mr. *Taylor*'s Author, dated 23d December 1720. In this Improbation, there was Certification pronounced *contra non producta*, which was long ago extracted; so that Mr. *Taylor* cannot, in any Process whatever, found on any Writing not produced in the Improbation, as they stand at present reduced, and must be held as such till the Certification is opened.

The Fact, therefore, being, that Mr. *Taylor* neither has, nor can produce any Title to connect with Sir *Donald Mackay*'s Charter in the 1624, the Presumption thence arising naturally is, that the Bishop got back the Property from Sir *Donald*, or that the Earls of *Caithness* or *Breadalbane* acquired Right thereto, since, in the 1687, the Bishop confirms the Earl's Right, and, of-new, feus these Lands to the Earl of *Breadalbane*, in a Charter on his own Resignation.

This, *hoc statu*, is the legal Presumption, and was this in the proper Process of Competition of Rights, the Petitioner apprehends that, so far as concerned the Superiority at least, he would be preferable on the Charter in the 1687 from the Bishop, as there are sundry Charters since of these Lands from the Crown. Surely, the Charter in the 1687 was a good Warrant for taking a Charter of these Lands of *Thura* from the Crown, and, accordingly, it has been shewn, that these Lands are contained in a Charter in favours of the Earl of *Breadalbane*, of a great many Lands belonging to the Bishop, with other Lands, under the Great Seal, dated 21st August 1694; they are also contained in a Charter in favours of *John Lord Glenorchy*, dated 26th July 1718, proceeding on the Resignation of his Father, the Earl of *Breadalbane*, and on several other Crown Charters since.

If Prescription is good for any thing, it must avail here, more especially, that these Lands were brought into the Crown Charters on a proper Warrant, namely, the Charter from the Bishop, which makes

makes this entirely different from Lands creeping into the Charter of a great Family without a Warrant. And, indeed, the Petitioner and his Authors have the same Title to get these Lands put into their Crown Charters that the Vassal now has, if he connected with the Charter to Sir *Donald Mackay*, namely, a Charter from the Bishop, and, with Submission, he can maintain, that he cannot be deprived of this Right in a regular Competition, much less by a Meeting of Freeholders.

If the Vassal thought he had a Title to hold of the Crown, why did he never attempt to make that valuable Part of his Right effectual, the more especially that he was called with the rest of the Vassals in a Process of Improbation and in sundry other Processes, such as Non-entry, Poinding the Ground, &c? But, instead of this, he treated with the Petitioner's Author, about taking out his Charter to be held of him, and never made any Attempt to hold his Lands of the Crown until now, that he is stirred up by others, for political Purposes; for, in a Process of Improbation, in which Decree of Certification is extracted, he did not pretend to exclude *Ulbster's* Right to the Superiority of his Lands, nor pretend that he had Right to hold of the Crown, by the Charter from the Bishop to Sir *Donald Mackay*.

Such being the Fact, it falls to be considered who is the Tenant of the Crown in these Lands? and, 2dly, Whether it is competent before a Meeting of Freeholders, to enter into a Competition of heritable Rights, and deprive the Tenant of the Crown of a Right of Superiority, if not of Property, of which he has been in Possession for near a hundred Years, in consequence of a legal and proper Right?

That the Petitioner is the Tenant of the Crown cannot be disputed, in consequence of a Charter from the Bishop.—He, therefore, is the only Person bound to perform the feudal Tenure; the Crown cannot be deprived of its Vassal, nor the Vassal of the Privilege belonging thereto *brevi manu*, or by any other Person who is not the Vassal of the Crown.

But, 2dly, It is not competent to enter upon a Competition of heritable Rights before a Meeting of Freeholders; their Power cannot be extended to deprive the Vassal of the Crown of a Right he enjoyed near a Century. If I come to the Freeholders with my Charter and Seafine, it is *jus tertii* to them to set up the Right of third Parties.—It is only competent to the Person who has that Right,

Right, to insist on it; but suppose he did, and had actually a Reduction in Court, the Freeholders cannot take hold of that, until the Title claimed on is set aside. If your Lordships find other-ways, then we shall see Competitions and Rankings before the Freeholders.—The Form, therefore, is, with Submission, clear against receiving this Objection.

And it is material for your Lordships to keep in mind that this is not the Case of Lands creeping into Charters of great Families without a Warrant, for the Lands here very properly came into the Crown-charters in consequence of the Charter from the Bishop, the very same Warrant, or at least equally good with that upon which Mr. *Taylor* pretends to take these Lands from the Petitioner, and hold them now of the Crown, as in place of the Bishop. The Question, therefore, which your Lordships have determined as a Court of Review, is truly the Point of Right between the Petitioner, in virtue of the Charter from the Bishop in the 1687; and the Possessor, upon the Charter to Sir *Donald Mackay* in the 1624, though he himself admits in his Duplies, that he neither has, nor can connect with that Charter, and, since he cannot, the Petitioner, with great Submission, would be glad to know upon what Law he can now take a Charter from the Crown, without showing that any of his Authors had a Charter from the Bishop, and exclude the Petitioner, who and his Authors hold of the Crown since the 1694, in consequence of the Charter from the Bishop in the 1687.

But the Petitioner can go further, and maintain, that he has, upon the Charter 1687, on which sundry Processes of Mails and Duties, &c. have been raised, a Right to the Property as well as the Superiority of these Lands preferable to the Possessor who does not connect with any Vassal of the Bishop, and with no Infestment in the Property, older than the 1720, and that such Competition will immediately come on, Mr. *George Taylor* may be certainly assured, for there is a Summons of Mails and Duties speedily to be raised against him, and the other Possessors of the Lands.

If, notwithstanding such a Right, your Lordships, as a Court of Review of the Proceedings of the Freeholders, shall in this Manner not only admit a Competition of heritable Rights, as competent before you, but shall determine the Point of Right, the Petitioner will be forgiven to say, that the Powers of the Freeholders will be extended beyond what he has always humbly conceived to be the

Meaning of the Law, and will lead into Consequences more dangerous to the Right of the Subjects than any political Decision yet given.

But your Lordships are To-morrow to determine a Case much stronger than the present. Mr. Menzies of Cudares claims to be inrolled in the Shire of *Clydesdale* on an Infeftment, proceeding on a Precept forth of the Chancery on a Retour, as late as the 1732.—It is objected by Mr. Campbell of *Shawfield*, that Part of the Lands in the Precept and Retour held of Mrs. *Baillie of Lamington*, which is offered to be proved by Mr. Menzies's Oath, and by Production of his Author's Titles. It is answered, that it was *jus tertii* to the Freeholders to insist upon the Right of third Parties, and it is probable the Vote will be sustained.

It is said in the Duplies, and indeed boldly averred, that a great many Lands are brought into *Ulbster's* Charter without any Warrant, and that he might create Votes as well upon the Property of the third Part of the County, which holds of the Crown, in place of the Bishop, as upon the Lands of *Thura*, because the Names of these other Lands are in *Ulbster's* Charter. But the Answer in fact is short and true, that the Petitioner defies the Objector to condescend upon any one Man in the County, that has taken a Charter from the Crown, as in place of the Bishop; on the contrary, every Vassal the Bishop had, have acknowledged *Ulbster* and his Author's Right; and, accordingly, such of them as have not bought the Right of Superiority from them, have acknowledged his Title, and paid the Feu-duties, this single Instance excepted; and your Lordships therefore will not be misled by bold Averments of this kind, as void of Truth as of Evidence, upon an Occasion of this sort.

In the same Manner, it is denied in the Duplies, that *Ulbster* at no Time used any Act of Superiority in support of his Title; but the Petitioner has already told your Lordships of sundry Processes raised by his Authors against their Vassals; and, among others, against the Possessor of the Lands of *Thura*, and he will satisfy your Lordships, why the Feu-duties and other Casualties of Superiority have not been more punctually exacted.

In the Year 1672, *George Earl of Caithness* disposed his whole Estate to Sir *John Campbell of Glenorchy*, afterwards Earl of *Breadalbane*.

In

In the Year 1719, the Earl of Breadalbane disposed the same Estate, which then consisted chiefly of Superiorities, to John Sinclair of Ulbster, who was succeeded by his Son, the present George Sinclair of Ulbster, from whom this Petitioner derives Right to this Superiority.

The Purchase made by the Earl of Breadalbane, was greatly disturbed by George Sinclair, a collateral Heir-male of the old Earls of Caithness, who assumed the Title and took Possession, *brevi manu*, of a considerable Part of the Estate conveyed to Lord Breadalbane. This was the Source of many Disputes before the Privy Council, which were at last determined in favour of the Earl of Breadalbane, who, in consequence thereof, recovered Possession.

But, Alexander Earl of Caithness, in the Years 1719, 1720, and 1724, raised three several Processes for setting aside the Purchase by the Earl of Breadalbane from the Earl of Caithness, and by Ulbster from the Earl of Breadalbane, and these Processes were only finally determined by a Judgment of the House of Lords, 22d February 1759.

These Law-suits, as might naturally be supposed, prevented the Feu-duties and other Casualties of Superiority, from being regularly uplifted and paid. Ulbster, however, was far from being negligent in ascertaining his Right to them, and preventing Prescription taking place, as already mentioned.

But the Objection to the Petitioner, which had most Weight with your Lordships, is, that neither he nor his Authors have been in Possession of these Lands, and, consequently, that he is destitute of one essential Requisite required by the Act 1681.

To this it is answered, in the *first place*, that there is a Distinction in the Act 1681, between one claiming on the old Extent, and one claiming on the valued Rent; for it is said, that he who claims on the old Extent must be "publicly infeft in Property or Superiority, and in Possession of a forty Shilling Land." But the Legislature does not require Possession in one who claims upon the valued Rent; all that is necessary is, that the Claimant "shall be infeft in Lands liable in publick Burdens, for his Majesty's Supplies, for 400*l.* &c."

Why the Statute has made this Distinction, the Petitioner cannot fully explain, though perhaps; if it were necessary, many sufficient Reasons might be assigned for it. He, however, comes before your Lordships to plead upon the Law as it stands, without being

being obliged to assign Reasons for every Part of the Law. He is advised, that your Lordships Judgments, in political Causes, are *strictissimi juris*; and he will be forgiven to say, that his Opponent has no great Claim to Favour, since it is surely more becoming, that the parliamentary Influence of *Caitbness* should be in the Hands of *Ulster*, a respectable Baron, who has the Property of a fourth Part of the County, and the Superiority of a great deal more of it, than that so important an Influence should be obtained by Persons, who have surely nothing to do on the North Side of the *Ord* of *Caitbness*.

But, in the *second place*, if your Lordships shall not be satisfied that the Statute does not require Possession upon valued Rent, the Petitioner hopes to convince your Lordships, that he is in the Possession which the Law understands every Superior to have, and which is all that the Law requires; so that he is not only within the Words, but within the Spirit of the Act 1681.

It is well known to your Lordships, that there are two Kinds of Possession, *viz. civil Possession*, and *natural Possession*, which all our Lawyers speak of as an undoubted Distinction.

“*Dividitur possessio* (says the learned *Voet*) *in naturalem et civilem; naturalis, ea dicitur, quæ in facto consistit, civilis vero, quæ in jure consistit. Et hoc est quod ab imperatore rescriptum possessionis duplicem esse rationem, aliam, quæ jure consistit, aliam quæ corpore, Lib. 41. Tit. 2. Par. 3.*”

The Writers on the Law of Scotland all concur in this Distinction, and show clearly, that the Superior has the *civil Possession*, and the Vassal, who holds the Lands of him, the *natural Possession*. The Petitioner shall quote the Words of the learned and accurate Mr. *Erskine*: “Possession is either *natural*, or *civil*. *Natural Possession* is, when one possesses by himself: Thus we possess Lands by labouring them, Houses by inhabiting them, Moveable by detaining them in our Hands.—*Civil Possession* is, our holding the Thing either by the sole Act of the Mind, or by the Hands of another, who holds it in our Name: Thus the Owner of a Thing lent or deposited, possesses it by the Borrower or Depositary; the Proprietor of Lands, by his Tacksman, Trustee, or Steward; the Pupil, by his Tutor, &c. The same Subject cannot be possessed entirely, or *in solidum*, by two different Persons at one and the same Time; and, therefore, Possession by an Act of the Mind ceases as soon as the natural Possession is taken up by another.”

" other. *Yet two Persons may, in the Judgment of Law, possess the same Subject at the same Time, on different Rights*; thus, in the Case of a Pledge, the Creditor possesses it in his own Name, in virtue of the Right of Impignoration, while the Proprietor is considered as possessing in and through the Creditor, in so far as is necessary for supporting his Rights of Property. The same Doctrine holds in Liferenters, Tacksmen, and generally in every Case where there are Rights affecting a Subject, distinct from the Property thereof."

From all which it is clear, that the Superior possesses by his Vassal, in the same way that a Proprietor does by his Tenant. And, in Conformity to these Principles, it was decided as far back as the 7th of March 1541, and never disputed since, that one who has obtained a Decreet of Removing against another is in the lawful Possession of the Lands, notwithstanding the other still continues to possess.

This Decision is to be found in *Balfour*, Title *Possession*. It is curious, and the Petitioner shall give it to your Lordships in the original Words:

" Gif Decreit of Removing be gevin aganis ane, decernand him to desist and ceis fra the Possessioun of ony Landis, and he nevertheless dois not the samin, he in quhais favouris the said Decreit is gevin, is understuid to be in lauchfull Possessioun of the saidis Landis, and he aganis quhome the said Decreit is gevin on nowayis to be in lauchful Possessioun thair of. 7th Martii 1541, the Lady *Fascastell* contra the L. of *Blanerne*."

The Obtain-
ar of remov-
ing lauchful
Possessour.

In short, by a *fictio juris*, he, in whom the Superiority of Lands is vested, is considered to be in Possession of these Lands; and thus, in every Seafine, there is *actual, real, and corporal Possession* given, although a Superior has not that Kind of Possession, otherways than in the Person of his Vassal.

Such being the Doctrine of our Law with regard to Possession, the Petitioner humbly apprehends, that it will not be difficult to satisfy your Lordships, that the Possession required by the Statute is no other than the Possession which he certainly has.

For, in the *first place*, the Possession required by the Statute cannot be natural Possession, otherways no Man could vote, whose Estate was set to Tenants.

But, *secondly*, Neither can it mean Possession, by having actually uplifted the Rents; for if a Man who has a good Vote should die, his apparent Heir has a Right immediately to a Vote, though

he have touched none of the Rents, nor done any Deed of a Proprietor.

In the same Way, a Purchaser of a real Estate, before the *Act 12th Anne*, which requires being inest one Year, could have voted the Moment after he was inest; and, at this Day, after the Year is elapsed, every Purchaser is intitled to vote, though he hath exercised no Act of Property over his Estate.

In the same Manner, a Person who has Right to a blench Superiority, which makes the whole, or even a small Part of a *cumulo* valued Estate, must vote without exercising any Act of Possession over his blench Vassal, because it is literally out of his Power to do so, he cannot be paid his one Penny *Scots*, there being no such Coin; yet none of your Lordships will say that he has not an undoubted Right to vote.

All these Examples show your Lordships the Sense of the Law upon this Point of Possession; for all these Superiors now mentioned, without having received any Rent, Casualty, or Duty whatever, would be intitled to vote, and could, with Truth, swear the Oath of Possession. The Reason is, they have a clear Right, and are therefore in the Eye of Law in Possession.

The only Pretence for a Difficulty in the present Case is, with great Submission, the very and unexpected Plea which the Petitioner's Vassal has been pleased to start against his Right; upon which it is to be observed, that this is owing to the Instigation of those Politicians who have thought proper to hoist their Colours in *Caithness*. Before the present Contests began, *George Taylor*, the Vassal, had many a Communion with *Ulster*, his Superior, and, like a good peaceable Gentleman, seemed very thankful for the Generosity which *Ulster* was so good as show towards him, and was most willing, and agreed to accept of his Charter; so that he properly acknowledged *Ulster* as his Superior, and his now drawing back cannot vary the Case.

Suppose a Person has the Property of an Estate, either as Heir or Purchaser, and before he comes to draw the Rents, a Politician should get the Tenants to disclaim him, and refuse Payment of their Rents, this surely would have no Effect. As it is a Maxim in Law, when a Man is found liable for a Subject, that *pro possessore habetur qui dolo desit possidere*, so it, from Parity of Reason, should obtain that, *pro possessore is habendus qui dolo excluditur a possessione*.

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The Petitioner, though indeed, with great Submission, cannot allow himself to entertain a Doubt, that your Lordships, upon a more full State of the Case, will be of opinion, that he has a good Title to be added to the Roll, the more especially, that he can, if necessary, prove that the Possessor acknowledged his Right, and agreed to take a Charter from him.

But as the most sanguine Hopes are sometimes deceived, he submits it to your Lordships, if in any Event he ought to be found liable in the statutory Penalty. If he shall be so unfortunate as to be found by your Lordships to have no Right to stand upon the Roll of his County, it will not surely be on account of the Objections which were moved to him at the Meeting of Freeholders. The Reasons for their rejecting to admit him were such that he thought himself well intitled to apply to your Lordships for Redress. He has come before you, and he has there been met by Sir *John Sinclair* of *Mey*, the very same Person who objected to him at the Meeting. Learned Counsel have been employed, and a Variety of new Points have been stated; but he cannot help thinking it hard, that a Freeholder should be allowed to keep another off the Roll by a few frivolous Objections; and, when the Person so kept off, in full Confidence that he is in the right, prefers his Complaint to this Supreme Court, that then his Antagonist should bring out against him a Number of Objections, of which he never before heard the smallest Surmise, and, on the Strength of these Objections, shall not only get him turned off the Roll, but found liable in statutory Penalties. This, with Submission, if encouraged by your Lordships, would be giving any evil-minded Freeholder an Opportunity of laying a Snare for his Neighbours; for, when a Gentleman finds himself turned off the Roll, on account of Objections which he can easily answer, is he not in the right to sue to your Lordships against such apparent Injustice? and if your Lordships shall find that the Freeholders did wrong,—is it just that a Man who has petitioned against that Wrong should be subjected to a Penalty, because his Qualification is found null, from Reasons of which he was not aware?

It is a noble Branch of the Constitution of this Court, that your Lordships are not merely Judges of Law, but that you have also enlarged Powers of Equity: Such valuable Powers, your Lordships, no doubt, will not allow to go into Disuse;—and surely there can

can be no fitter Opportunity for the Exercise of Equity than in a Case of this Nature.

The ingenious Author of Principles of Equity delivers his Sentiments upon this Subject with that Philosophy and Spirit for which he is distinguished. "A Penalty," says he, "cannot be extended beyond the Words, but it may be limited within the Words upon Circumstances that infer Innocence." And after observing, that, in the Case of Captain *Forbes* of *New*, his *bona fides* was sustained to free him from the Penalty, the ingenious Author says; "yet, upon a Reclaiming Petition, this Interlocutor was altered, and he was found liable for the Penalty. The Judges continued in their former Opinion, that he acted *bona fide*, but the Plurality thought that they had no Power to mitigate the Statutory Penalty; which was, in effect, maintaining a very absurd Proposition, that a Punishment may be inflicted on an innocent Person for an Error of Judgment merely."

And a little after, "A Man happens to mistake the Statute, or rather happens to judge differently from what is afterwards found to be the Meaning, in a Court of Law: Is it consistent with the Rules of Morality, or of common Justice, to subject this innocent Person to the Penalty?"

The Petitioner leaves these admirable Principles with your Lordships, in humble Confidence that you will apply them in his favour, if it shall be found necessary; but he hopes that there will be no occasion for this, as he flatters himself that the Court will now see sufficient Ground to sustain his Claim.

May it therefore please your Lordships to alter your former Interlocutor; to find that the Petitioner ought to be added to the Roll of Freeholders of the County of Caithness; to ordain him to be added accordingly; to give the necessary Directions for carrying that Order into Execution; and, at any rate, to find, that he is not liable in the statutory Penalty and Costs.

According to Justice, &c.

JAMES BOSWELL.